Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

Government of Guam and Edna T. Paulino,
Petitioners,

v.

Pacificare Health Insurance Company
Of Micronesia Inc.,
dba Pacificare Asia Pacific,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Territory of Guam

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. *et seq.*, made applicable to all arbitrations in the territory of Guam by 9 U.S.C. 1, prohibits arbitrators from terminating a contract for grounds not specified in the contract.

LIST OF PARTIES AND AFFILIATES

The Petitioner is the Government of the unincorporated territory of Guam established by 48 U.S.C. 1421a.

The Respondent is Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific.

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Petitioner Government of Guam respectfully requests that this Court grant its Petition for a Writ of Certiorari to review the Opinion of the Supreme Court of Guam.

OPINIONS BELOW

The Opinion of the Supreme Court of Guam is *Government of Guam v. Pacificare Health Insurance Co., of Micronesia, Inc.*, 2004 Guam 17. (hereinafter "Opinion") It is available at 2004 WL 2492881. It also appears in the appendix of the Petitioner (Pet. App.) at Pet. App. 1a-56a. The Order denying rehearing is unpublished and appears at Pet. App. 1b-3b. The Superior Court of Guam's Decision and Order vacating the arbitral award and denying confirmation of that award is unpublished and appears at Pet. App. 1c-36c. The award of arbitration appears at Pet. App. 1d-2d.

JURISDICTION

The judgment sought to be reviewed was entered on September 20, 2004. Pet. App. 1e-3e. A timely Motion for Rehearing was filed and denied by the Supreme Court of Guam on November 11, 2004. Pet. App. 1b-3b. This Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. §1257(a) as applied to the territory of Guam by 48 U.S.C. §1424-2 as amended by Section 2 of P.L. 108-378, effective on October 30, 2004.

RELEVANT STATUTORY PROVISIONS

9 U.S.C. §1

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage,

supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District of Columbia and any State or Territory of a foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. §2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §10

(a) In any of the following cases the United States court in and for the district

wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Title 4 Guam Code Annotated §4301(g) – Group Insurance – Continuing Clause

(g) I Maga'lahen Guahan [the Governor] of Guam shall incorporate the continuing provision clause made available to Guam Memorial Health Plan, FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case *Government of Guam v. FHP, Inc.*, 1991 WL 275584 [only cite available] (D. Guam App.Div. 1991), in the government's group health insurance agreement with any health insurance company, or its assignees or successors, which has contracted with the government of Guam for at least two (2)

consecutive years. This Subsection shall be retroactive to include any insurance companies falling within said classification for the past five (5) years from the date of enactment of this Subsection, regardless of whether they currently have a group health insurance contract with the government of Guam, and shall entitle the group health insurance company to immediately enter into a contract with the government with said continuing provision included. In the event that the government had already negotiated the terms of a contract with a group health insurance company qualifying herein, but not executed the contract, said contract shall be offered to the insurance company with the continuing provision incorporated.

For purposes of starting the new contracts with the insurance companies qualifying for the continuing clause, the government of Guam shall immediately conduct a government-wide thirty (30) day Open Enrollment for all group health insurance companies qualifying as of the date of enactment of this Act.

STATEMENT OF THE CASE

On November 18, 2002, the Government of Guam (hereinafter, "the Government") entered into a contract between it and Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific (hereinafter "Pacificare") to provide health care benefits for its employees. As in past years and now required by statute (4 GCA §44301(g)), the contract for Fiscal Year 2004, the year

in question here, contained the following language - referred to in 4 G.C.A. §4301(g) as the "continuing provision" and colloquially known as the "continuing clause":

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to Pacificare not less than ninety (90) calendar days from the renewal date, or unless modified by mutual agreement.

Opinion ¶42, Pet. App. 32a.

During the negotiations for the FY 2004 employee health benefit package, the parties could not agree on rates. The matter went to arbitration and an award was made. Pet. App. 1d-2d. The award declared, as desired by Pacificare and opposed by the government of Guam, that the contract was to be terminated at the end of the current fiscal year.

The Government sought to overturn this award and it prevailed in the Superior Court of Guam. *Government of Guam and Edna T. Paulino v. Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific,* Civil Case No. CV1426-03, (Sup.Ct. Guam, October 20, 2003). Pet. App. 1c-36c. The Superior Court characterized the Government's argument that the arbitrators exceeded their powers by allowing Pacificare to terminate the contract upon grounds not specified in the contract as an argument relating to the *arbitrability* of the termination issue. Pet. App. 17c. The Superior Court held that the arbitrators exceeded their powers by allowing Pacificare to terminate

the contract on the grounds that agreement on medical rates had not been reached. Pet. App. 33c-36c.

Pacificare appealed to the Supreme Court of Guam, which rejected the Petitioner's (Government's) challenge to the arbitration award based upon the Federal Arbitration Act. *Government of Guam and Edna T. Paulino v. Pacificare Health Insurance Company of Micronesia, Inc. dba Pacificare Asia Pacific,* 2004 Guam 17. Pet. App. 1a-56a.

In its Opinion, at ¶11-12, the Supreme Court of Guam held that the Federal Arbitration Act, 9 U.S.C. §§1-16 (hereinafter "FAA") applied to the facts of the case. Pet. App. 7a-8a. At ¶24 of the Opinion, the Court noted that under 9 U.S.C. §10(a)(4) a lower court could vacate an arbitration award when the arbitrators exceeded their powers, and further noted that arbitrators would exceed their powers if they arbitrated a dispute that was not arbitrable in the first place. Pet. App. 19a-20a. At ¶34 of the Opinion, the Court held that in light of the broad language of the arbitration clause, "a dispute concerning whether Pacificare could be released from its obligations was a subject matter which was arbitrable under the parties' Agreement." The Supreme Court also held "[f]urthermore, there is nothing in the Agreement which excluded the issue of termination from resolution pursuant to the arbitration clause." Pet. App. 26a. At ¶26 of the Opinion, the Court found that the fact that the contract enumerated specific circumstances where termination was allowed did not alter its conclusion that the issue of termination was within the arbitrators' authority to decide. Pet. App. 20a-22a. However, the majority finally concluded that the Superior Court had erred in even ruling on this question, since the case turned on a procedural matter, which was within the purview of the arbitrators, and was not the court's, to decide. Opinion, at 34. Pet. App. 26a.

The dissenting opinion began by noting the arbitrators are only permitted to decide procedural matters that are related to subjects which are arbitrable in the first place, and that the question of whether Pacificare had a continuing obligation to provide coverage when the parties failed to mutually agree on rates for FY 2004 was one for the courts to decide since it related to the arbitrability of the termination issue. Opinion at ¶60. Pet. App. 44a. The dissenting judge went on to side with the Superior Court's holding that termination of the arbitration award for failure of the parties to agree on rates was in excess of the powers of the arbitrators and presented cause to vacate the arbitration award under 9 U.S.C. §10(a)(4). The dissenting judge said that "it is clear that the Government . . . did not intend to arbitrate the question of Pacificare's continued obligation to offer coverage where the parties could not simply agree on rates. Thus, the arbitrators ignored the Agreement's clear contractual limitations regarding their authority. The arbitrators acted on a subject which they had no authority to decide." Opinion, at ¶73. Pet. App. 55a-56a. The Guam Supreme Court, however, after further analysis, upheld the arbitrators decision permitting the contract to be terminated because the parties could not agree on rates.

From that Decision, the Government is petitioning for a Writ of Certiorari from this Court.

STATUTORY BACKGROUND

Section 2 of the Federal Arbitration Act (hereinafter, "the FAA") provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. As this Court has explained, Congress's goal in enacting the FAA was to

overcome deep-sated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, e.g., *Volt Info. Scis, Inc. v. Board of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded 20 years ago, and more recently has reaffirmed, that §2 of the FAA applies both in state and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*).

Essential to Congress' goal of ensuring the enforcement of parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Button, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479). See also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); see also *E.E.O.C. v. Waffle House, Inc.*, 122

S.Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) quoting *Volt*, 489 U.S. at 479.

FACTUAL BACKGROUND

In November of 2002, Pacificare and the Government executed a 2003 Group Health Insurance Agreement/Health Services Agreement (hereinafter "the Agreement"). The Agreement was a contract for group health insurance for Government of Guam employees, retirees and dependents for Fiscal Year 2003. The Agreement contained an automatic annual renewal provision colloquially known as the "continuing clause", *supra*, and general procedures for setting rates annually. Opinion, §2 Pet. App. 3a. The Agreement also contained an "Attachment III – Pacificare Asia Pacific Arbitration Procedure." This agreement to arbitrate contained a broad arbitration clause, set forth in relevant part as follows:

> Section 1. ARBITRATION PROCEDURE
>
> "Arbitration"
>
> 1.01. *Any dispute* or controversy between the parties arising under this *Agreement* shall be submitted to binding arbitration.

Opinion ¶34, Pet. App. 26a.

The Agreement also set forth specific grounds for termination of the Agreement, to wit:

1. The automatic renewal clause, section 2.1 of the Agreement, provided that the Agreement "shall renew

[14] We review a lower court's order vacating an arbitration award *de novo*. *Teamsters Local Union 58 v. Boc Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002). The *de novo* "standard is 'intended to reinforce the strong deference due an arbitrative tribunal.'" *Brook*, 294 F.3d at 672 (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir.1993)). The lower court's legal rulings in vacating an arbitration award are reviewed *de novo*, while factual findings are reviewed for clear error. *See* Sumitomo Constr. Co. v. Zhong Ye, Inc., 1997 Guam 8, ¶ 9.

Government of Guam employees prior to the resolution of the dispute by the arbitrators. The Government essentially sought performance of the Agreement *pending arbitration*. We are guided by the reasoning articulated by the Fourth Circuit in *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001). The Court stated:

> Put simply, the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations. When the Government chooses to seek damages in a civil action, it—like all parties—should abide by the law, including an arbitration process to which it is contractually bound.

Id. Here, the Government itself argued before the lower court that the parties should await the outcome of the arbitration. Considering this, it would be "grossly inequitable" for the Government to use sovereign immunity as a sword to negate the arbitration agreement itself. *Ruppenthal v. State, By and Through Econ. Dev. & Stabilization Bd.*, 849 P.2d 1316, 1321 (Wyo. 1993) ("To permit [a recoupment defense] would seem to be no more than simple justice; to deny it the right would be grossly inequitable. No one would assert that in an action by the sovereign, valid legal defenses should be denied the defendant.") (alteration in original). "To allow a state to enter into a contract and then deny the other contracting party a remedy under the contract would be to 'ascribe bad faith and shoddy dealing to the sovereign.'" *State v. Sorensen*, 436 N.W.2d 358, 364 (Iowa 1989).

nature, that the issue of what kind of arbitration proceeding the parties agreed to was a question courts presume the parties want the arbitrators, and not the courts, to decide. The plurality remanded the case to the arbitrators for decision on whether the contracts permitted or forbade class actions.

Because the plurality in *Green Tree Financial Corp.* did not reach the issue of whether the FAA allows arbitrators to find that, under a broad arbitration clause in a contract, contractual rights or obligations exist in the absence of express provision of those rights or obligations elsewhere in the contract, the question remains undecided by this Court. Another reason this Court should grant certiorari was the Guam Supreme Court's rationale for upholding the arbitrators' decision that the Agreement could be terminated for grounds not specified in the Agreement. The stated reasons were that such a termination was encompassed within the ambit of a broad arbitration clause in the Agreement, such a termination was not prohibited by the Agreement, and such a termination was justified because of the impossibility of foreseeing all possible grounds for termination. As will appear, the rationale of the Opinion contravened relevant decisions of the Court holding that an arbitration agreement should be strictly enforced according to its terms.

Therefore grounds exist for this Court to grant review. Rule 10(c), Rules of the Supreme Court of the United States.

> The Federal Arbitration Act Applies To All Arbitration Within Guam And Guam Courts Are Required To Follow The Federal Case Precedent In Applying The Act

The Federal Arbitration Act applies to arbitration agreements in contracts involving "commerce in the Territories," 9 U.S.C. §1 West, Westlaw through P.L. 108-498 (End) (excluding P.L. 108-446, 108-447.) ("['C]ommerce,' as herein defined means commerce among the several states . . . or in any territory of the United States . . . or between any such Territory and another, or between any such Territory and any State or foreign nation . . .")

In its Opinion, the Guam Supreme Court held that the FAA applied to the dispute in the instant case. Opinion ¶11-12. Pet. App. 7a-9a. In a footnote, the Court indicated that since the local statute addressing vacation of arbitration awards was identical in language to 9 U.S.C. §10, that the Superior Court's Decision and Order made pursuant to that local statute would be reviewed as "having been made pursuant to" 9 U.S.C. §10. Opinion, ¶17, note 5. Pet. App. 14a-18a. Hence the Supreme Court would "rely on authority interpreting and applying section 10 of the FAA in reviewing whether the lower court correctly vacated the arbitrators' award." *Id.*.

The Ninth Circuit Court of Appeals, in *Guam v. Guerrero*, 290 F.3d 1210, 1217-1218 (9th Cir. 2002) held that a territorial court lacks the authority to interpret a federal statute contrary to the interpretation this court has given it, *citing Kepner v. United States*, 195 U.S. 100, 123-24 (1904); *Weems v. United States*, 217 U.S. 349, 367 (1910); *United States v. Husband R..*, 453 F.2d 1054, 1058 (5th Cir. 1971); and *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96, 100 (1st Cir. 1946). In the instant case below, the Supreme Court of Guam, while citing federal law as controlling, deviated from federal precedents in concluding that the arbitral award against the Government of Guam was proper.

The FAA Requires That An Arbitration Agreement Be Strictly Enforced According To Its Terms

Parties are required to arbitrate only those questions that the parties have agreed in advance to submit to arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 626. Resolution of whether the parties in the instant case agreed that the arbitrators could terminate the Agreement on grounds other than those specifically provided in the Agreement implicates two seemingly contradictory policies promoted by the Federal Arbitration Act – the policy favoring arbitrability and the policy requiring strict enforcement of the parties' arbitration agreements.

Determining whether parties have agreed to arbitrate a dispute involves application of the federal substantive law of arbitrability. *Id.* at 626, quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). That body of law counsels that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". *Id.*

However, arbitration awards must be consistent with the central purpose of the Federal Arbitration Act, which is to ensure that "private agreements to arbitrate are enforced according to their terms". *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. at 479. See also cases cited *supra*, at 8 and cases cited *infra* at 17. *The Government contends that where, as in the instant case, the arbitration agreement does not expressly provide for, or forbid, arbitration of the matter in controversy, the policy requiring enforcement of arbitration agreements according to their*

terms should apply. Hence the Guam courts had no authority to authorize arbitrators to allow termination of the contract for failure of the parties to agree on rates, where the Agreement did not expressly provide for termination based on that ground.

The Guam Supreme Court, in finding that the question of whether the Agreement could be terminated for failure of the parties to agree on rates was arbitrable, based its decision on the policy favoring arbitrability, stating that any doubts about the scope of the arbitrable issues should be decided in favor of arbitration. Opinion ¶26, Pet. App. 20a-22a. The majority, writing the Court's Opinion, stated that before concluding that the parties intended that an issue not be arbitrated, the intent to exclude such issues from arbitration must be clear, and that ambiguities as to the scope of the arbitration clause must be resolved in favor of arbitration. Opinion ¶26, Pet. App. 20a-22a. The Guam Supreme Court concluded that Pacificare's continued obligation to provide health coverage for FY 2004 in the event of the parties' failure to agree on rates was included within the ambit of the Agreement's broad arbitration clause. The Court reached this conclusion in part because of the breadth of the language of the arbitration clause and the lack of any provision in the Agreement which would prohibit termination based on failure to agree on rates. Opinion ¶34, Pet. App. 26a.

The Court also concluded that termination was allowable for a ground not specified in the Agreement because the parties could not be expected to anticipate every possible issue that could arise, and provide for it in the Agreement. Opinion ¶43. Pet. App. 32a-34a.

The dissenting Justice, in his explanation of the reasons he believed that the issue of termination upon the

parties failure to agree on rates was not arbitrable, did not mention the policy that an arbitration agreement be strictly enforced according to its terms. However, he did quote from some case holdings to the effect that, in determining whether an issue was arbitrable, the parties' intent was paramount. He finally concluded with the opinion that, when determining whether the parties intended that a particular subject should be arbitrated, the standard of proof should be "clear and unmistakable", the same standard used in determining *who* should determine questions of arbitrability. Opinion ¶72, Pet. App. 53a-54a.

Thus the Government contends that both the majority and the dissent in the Opinion below were incorrect in their approach to the question of the arbitrability of Pacificare's continued obligation to provide coverage in FY 2004, and that the proper resolution of the question is found in the policy requiring strict enforcement of the terms of a contract. Although this argument was not made below, the issue to which it relates – arbitrability – was raised below. *Illinois v. Gates*, 462 U.S. 213, 220 (1983) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.")

The FAA's policy of strict enforcement of the terms of an arbitration agreement would allow termination for only the grounds specified in the Agreement, and, as will appear *infra*, pre-empts the Guam Supreme Court's construction of the Agreement.

A number of cases of this Court have held that interests of efficiency and equity do not supercede the interest in strictly enforcing an arbitration agreement in accordance with its terms when the issue sought to be arbitrated is not addressed in the contract.

In *Moses H. Cone Memorial Hospital*, 460 U.S. at 20 and *Dean Witter Reynolds, Inc.*, 470 U.S. at 219-22, this Court insisted on compliance with the terms of the arbitration agreement even though the result would be bifurcated and piecemeal proceedings, stating in *Volt Information Sciences, Inc.*, 489 U.S. at 478, that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."

In the case below, the majority justified its allowance of termination on a ground not specified in the Agreement for the reason that the parties could not be expected to anticipate every possible issue that may arise. As indicated, *supra*, this Court has held that deviations from compliance of the exact terms of an arbitration agreement are not justified by considerations of equity and efficiency.

There are good reasons for limiting arbitrable issues to the terms of a contract. To do otherwise allows a court to frustrate private agreements by modifying those agreements whenever they do not unambiguously preclude a result that the court, in its discretion, believes will serve efficiency or equity. Moreover, the FAA was designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms; to hold otherwise would obligate parties to draft arbitration agreements foreclosing every eventuality. Moreover, allowing courts to substitute their notion of equity and efficiency for that of the parties would deprive parties of the benefit of their bargain. Finally, arbitration agreements often appear in form contracts that are employed or appear in more than one state. Therefore a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside.

For the foregoing reasons, the policy that agreements to arbitrate should be strictly enforced according to their terms should be applied to the facts of this case, and as a consequence, the Opinion of the Guam Supreme Court should be pre-empted by this federal policy.

The Guam Supreme Court Opinion Was Pre-empted By The Policy Of The FAA

"States may regulate contracts, including arbitration clauses, under general contract law principles," *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995). "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.*, 489 U.S. at 474. But "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 477, (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt, 489* U.S. at 479 (internal quotation marks omitted)). See also *Doctor's Associates, Inc.*, 517 U.S. at 688; *First Options of Chi, Inc. v. Kaplan,* 514 U.S. 938, 947 (1995). In other words, Congress sought simply to "place such agreements upon the same footing as other contracts." *Volt,* 489 U.S. at 474 (quoting *Scherk v. Alterto-Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted)). This aim "requires that we rigorously enforce agreements to arbitrate," *Mitsubishi Motors Corp.*, 473 U.S. at 676 (quoting *Dean Witter Reynolds, Inc.*, 470 U.S. at 221 (internal quotation marks omitted)), in order to "give effect to the contractual rights and expectations of the parties," *Volt,* 489 U.S. at 479.

See also *Mitsubishi Motors*, 473 U.S. at 626 ("[A]s with any other contract, the parties' intentions control").

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Here, the parties saw fit to agree that the arbitration conducted pursuant to the arbitration clause would be in conformity with the terms of the Agreement.

Sec. 1.01 Pacificare Asia Pacific Arbitration Procedure, Attachment III of the Agreement, states in relevant part:

> [t]he arbitration shall be in conformity with and subject to the following rules and procedures:
>
> . . .
>
> 1.01.24 Rules Binding. *The arbitrators shall be bound by this Agreement.* . . . (emphasis added)

Hence, section 1.01 of Attachment III incorporates the terms of the Agreement at large into the arbitration agreement, including the grounds for termination specifically enumerated in the Agreement, thus dispelling any doubt that the terms of the Agreement are part of the arbitration agreement.

Inasmuch as the purpose of Congress is that the Agreement be strictly enforced in accordance with its terms, and termination for failure of the parties to agree on rates is not a term of the Agreement, the Opinion of the Supreme Court of Guam should be pre-empted by the FAA.

This Case Presents An Appropriate Vehicle For Resolving Whether The FAA Allows Arbitrators To Find, Under A Broad Arbitration Clause In A Contract, That Arbitrable Contractual Rights Or Obligations Exist, In The Absence Of Express Provision Of Those Rights Or Obligations In The Contract.

The policy requiring strict enforcement of the terms of a contract by arbitrators was recently sought to be vindicated in this Court in a case where the contract was silent as to the matters in controversy. *Green Tree Financial Corp., v. Bazzle,* 539 U.S. 444 (2003). However, this Court, by characterizing the question sought to be arbitrated as relating to "arbitration procedures", did not reach the issue. This Court characterized the issue as a matter of procedural arbitrability properly remanded to the arbitrators to decide, instead of questioning whether the parties had actually agreed to submit the question to arbitration in the first place. Therefore, this Court did not reach the issue of whether a determination of the substantive arbitrability of a matter under a broad arbitration clause requires strict enforcement of the terms of the contract where the contract is silent as to the matter in controversy.

In *Green Tree Financial Corp.*, this Court upheld a decision by the Supreme Court of South Carolina confirming decisions of an arbitrator to treat an arbitration as a class action, where the contract in question was "silent" i.e., it did not expressly provide for, or forbid, class action arbitration. The arbitrator had held a lender liable for damages to a class of consumers for failure to make disclosures required by the South Carolina Consumer Protection Code. The question brought before this Court by the lender was whether an arbitration brought by a single consumer could be expanded into a class action consistent with the Federal Arbitration

Act, where the contract in question did not by its terms permit class-action arbitration.

In the case below, *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002) the South Carolina Supreme Court confronted choosing between a line of cases expressing a majority view that for a class-action arbitration to be permissible it must be authorized by the terms of the contract between the parties, and line of cases expressing a minority view. The minority view holds a class action arbitration is permissible even if the contract is silent on the subject; provided, class action arbitration is encompassed by the language of the contract's arbitration clause, it would serve equity and efficiency, and it is not specifically prohibited by the contract. The Supreme Court of South Carolina adopted the minority view.

This Court granted certiorari to determine whether it was consistent with the Federal Arbitration Act for the South Carolina Supreme Courts to hold that class arbitration is permissible in the absence of language in the contract permitting it. 539 U.S. at 447. But the plurality of Justices (Breyer, Scalia, Souter and Ginsberg) did not rule on the question of whether the decision of the South Carolina Supreme Court was consistent with the Federal Arbitration Act. Only Justice Stevens (concurring in judgment and dissenting in part) ruled that the South Carolina Supreme Court's decision was consistent with the Federal Arbitration Act. The dissenting Justices (Rehnquist, O'Connor and Kennedy) ruled that the decision of the South Carolina Supreme Court was inconsistent with the Federal Arbitration Act.

The reason that the plurality did not rule on whether the conduct of the arbitration as a class action was consistent with the Federal Arbitration Act was because the plurality

held that the question of *what kind of arbitration proceeding the parties agreed* to, i.e. whether the contracts in question forbid class arbitration, was a question for the arbitrators, and not the courts to decide. The plurality held that this question related to "arbitration procedures" and was not the type of question the courts presume the parties intend the courts and not the arbitrators to decide. 539 U.S. at 452-453.

Hence, the plurality did not rule on whether the South Carolina Supreme Court's ruling was inconsistent with the Federal Arbitration Act, but rather remanded to the arbitrators the question of what kind of arbitration agreement the parties agreed to, i.e. whether the contracts in question forbid class arbitrations.

The dissenting Justices held that the question of what kind of arbitration proceeding the parties agreed to was "more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options [of Chi., Inc. v. Kaplan,* 514 U.S. 938 (1995)] than it is 'to allegations of waiver, delay, or like defenses to arbitrability,' which are questions for the arbitrator under *Howsam [v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)]". 539 U.S. at 457. The dissenting Justices said that since the question of what kind of arbitration proceeding the courts had agreed to was a question for the courts, and not for the arbitrators to decide, this Court could review the consistency of the Supreme Court of South Carolina's determination of that issue with the FAA. The dissenting Justices went on to find that the South Carolina Supreme Court decision was not consistent with the FAA. The dissenting Justices opined that the FAA. requires that agreements to arbitrate be enforced strictly in accordance with their terms. Applying this standard of review, the dissenting Justices found that the arbitrators' choice of class action arbitration contravened a term of the

contract – the term of the contract providing for the selection of the arbitrators. 539 U.S. at 459.

In the instant case, however, unlike the circumstances under review in *Green Tree Financial Corp.* there is no doubt that the issue of the permissibility of termination for failure of the parties to agree on rates – a cause for termination not provided in the Agreement – is a question of substantive arbitrability. The question before the Court is whether the parties agreed to submit to arbitration the matter of whether the Agreement should be terminated for failure of the parties to agree on rates. This is not an issue of whether "the conditions precedent to an obligation to arbitrate have been met", *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), but rather whether the parties have agreed to submit a particular controversy to arbitration.

This case, then, presents an appropriate vehicle for determining whether the FAA requires that, when the contract is silent as to the matters in controversy, the policy requiring strict enforcement of the terms of a contract applies. It squarely presents the question on which the Petitioners to this Court in *Green Tree Financial Corp.* were seeking the Court's ruling, but this Court was deflected from reviewing because of the procedural nature of the question of what kind of arbitration the parties agreed to.

Moreover, the Guam Supreme Court's Opinion was not based on "independent state grounds". The issue in this case is whether the FAA pre-empts the Guam Supreme Court's application of local Guam law - judicially made law that would allow grounds for termination to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA pre-empts state law is a federal question).

Additionally, this Court has held that whether a state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. §1257. *Id.*

Hence, since this case involves a question of substantive arbitrability, is not based on independent state grounds, and involves a question within the jurisdiction of this Court, this case presents an appropriate vehicle for resolving whether the FAA allows arbitrators, under a broad arbitration clause in a contract, to find that arbitrable contractual rights or obligations exist, in the absence of express provision of those rights or obligations in the contract.

The Issue Whether The FAA Allows Arbitrators, Under A Broad Arbitration Clause, To Find An Arbitrable "Term" Not Otherwise Provided In The Contract Presents An Important And Recurring Issue That Warrants This Court's Review

The question presented here is of great practical importance. Broad arbitration agreements are the norm. Where, as in the instant case, there is no limitation on the issues that can be submitted to the arbitrators, Opinion ¶72, note 17, Pet. App. 53a-54a, the only thing preventing the arbitrators from fashioning rights, obligations and remedies never contemplated by the parties when they signed their contract is the federal policy requiring strict enforcement of the terms of arbitration agreements.

The Opinion of the Supreme Court of Guam holds that, because of the unforseeability of events which might cause a party to want to terminate the contract, it is only right, fair and just for the arbitrators to insert terms in the original contract not contemplated by the parties. This

Opinion holds that various terms may be added to the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to trod on the parties' intentions, but also as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring those agreements to become voluminous in order to preclude every imaginable eventuality. This Court should hold that the Federal Arbitration Act prohibits arbitrators from finding, under a broad arbitration clause in a contract, arbitrable contractual rights and obligations in the absence of an express provision of those rights and obligations elsewhere in the contract.

Dated this 29th day of January, 2005.

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